Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	MM Docket 93-25
Protection and Competition Act	)	
of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

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May 24, 1993

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I. INTRODUCTION

The Satellite Broadcasting and Communications Association of America (SBCA) is pleased to submit to the Commission its comments in the above-referenced proceeding. This rulemaking is timely in several respects. In the first place, SBCA would agree, as a general matter, that the policy of requiring all broadcasters some responsibility regarding "public interest," as it is currently envisioned, is a sound one. Because broadcasting entails the use of the public frequency spectrum, both by local, over-the-air broadcasters as well as Direct Broadcast Satellite entities, a public interest

obligation of some sort is not unreasonable. Furthermore, the satellite industry is about to witness the unveiling of a new generation of high-powered DBS services utilizing small antennas, digital transmission and compression which could revolutionize direct-to-the-home program delivery and increase substantially satellite

reception equipment; and local, regional and national distributors and retailers of

satellite hardware and programming services who deal directly with consumers. Pur-

a national scale), but the manner of presentation and the particular programming are left to the broadcasters' editorial judgement.

Regarding the political programming requirements of Sections 312(a)(7) and 315, SBCA agrees with the Commission's conclusion that it should apply these provisions to DBS providers in the same manner which maximizes their flexibility by allowing them to fulfill their political broadcast obligations on a single channel, or on any number of channels, subject to reasonable comparability requirements with respect to audience size, etc. There should be no political access or advertising requirements imposed on particular DBS channels or program services, and in no event should subscription services be required to carry political commercials or other political announcements or programming.

II. DEFINITIONS

The Congress undertook a complex task in attempting to sweep into the definition of DBS providers those services which operate under either Part 100 or Part 25 of the FCC Rules. All direct-to-the-home satellite service as we know it today is covered by Part 25 of the Rules. As a general rule, a programming service will lease one or more transponders from a satellite systems company licensed to operate in the C-Band. The programmer then utilizes the transponder(s) to transmit to viewers (if in the clear) or to subscribers (if scrambled) original programming or the programs it has been licensed

to carry by the rights owners. With the exception of Primestar, none of the existing services constitute a DBS service as envisioned by the Congress in Section 25 of S.12. So in drafting this provision, Congress was faced with distinguishing between the lone DBS provider operating on a Ku-Band satellite licensed under Part 25, and all the other services utilizing C-Band satellites also licensed under Part 25.

By necessity then, the definition of DBS provider has been bifurcated between the two FCC Rule Parts. The applicability of the definition for services operating under Part 100 seems quite clear in Section 25 of the Act which utilizes the term "licensee." Thus an entity which is licensed by the FCC to own or operate a satellite or transponders in the Ku-Band under Part 100 of the Rules must comply with the public service obligations of the Act.

The Commission asks for comments in this regard as Part 100 licensees might "delegate" these obligations to an entity actually controlling the distribution of the programming. It is difficult at this stage to identify the actual distribution structure that a Part 100 licensee may engage in. For example, a DBS licensee may elect to offer program services itself utilizing transponders operating on a satellite it has also manufactured. Another DBS provider may be offering programming from transponders it leases; while another, for the sake of argument, may own transponders but not be the manufacturer of the satellite. Furthermore, there may be other distribution variations which we cannot envision at this time, including simply the use of existing retail

dealers as sales agents for program services, much as is the practice today in the C-Band services.

We can only conclude that, based on the plain language of the Act, coupled with the varying program distribution structures, the FCC's most efficient route is assigning a Part 100 licensee, whether or not that licensee is the owner of the satellite, the responsibility for fulfilling the public service obligation.

Making a similar determination for a Part 25 service however would be a much more difficult if not impossible task. That is why the definition of a Ku-Band service operating under Part 25 of the Rules was tailored so narrowly in the statute. As we have discussed above, a traditional Part 25 satellite licensed in the C-Band makes transponders available to individual program services on a lease or purchase basis. Congress did not envision current C-Band operations as having a formal public interest obligation when it enacted S.12 because imposing such a requirement would have entailed transponder lessees to break up their program day-parts to satisfy the statute.

Instead, Congress envisioned application of the obligation for Ku-Band DBS under Part 25 in terms of "control" of a "minimum number of channels" which the FCC would determine based on, we assume, its assessment of an equitable working of the DBS market place. The definition <u>should</u> encompass that entity which actually controls the channels for the national (or regional) distribution of program services. <u>In no event</u>

however should Section 25 be construed as granting the Commission authority to license distributors who fall under the definition. The statute calls only for the public service obligation to fall on distributors who utilize Ku-Band satellites licensed under Part 25 -- nothing more, nothing less.

III. QUANTIFICATION OF NUMBER OF CHANNELS

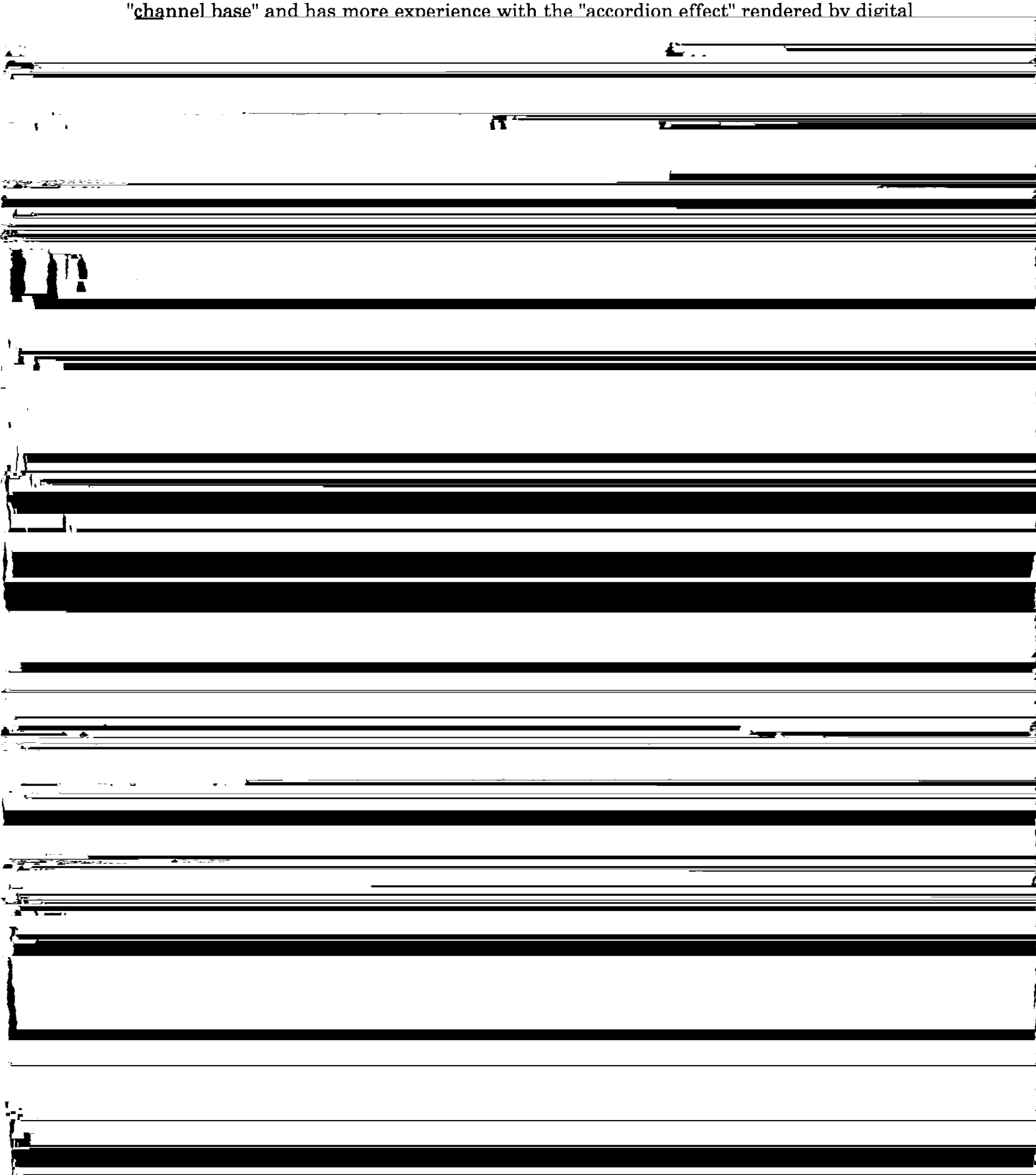
Section 25 also requires the FCC to specify a minimum number of channels for a Part 25 DBS service which would trigger the public service obligation. The Commission has correctly identified the two major factors involved in making such a determination. The first is what are appropriate criteria to apply in order to arrive at the "minimum number of channels." The second is how to determine the "channel base" from which to make this measurement, given that compression technology can alter the total number of channels available at any given time.

The compression of video signals utilizing digital transmissions is the next frontier of video delivery. It has the potential to deliver more channels than ever before to consumers from the same number of 24-MHz or 36-MHz wide transponders. It would

time will depend on the type of programming scheduled for each day-part. This "accordion effect" will create an expansion or contraction in the total, usable "channel base," reflected in the compression ratios for each individual program.

The "accordion effect" will play an important part in how the Commission counts the

full impact of compression is not known. Thus, until a provider has stabilized its "channel base" and has more experience with the "accordion effect" rendered by digital



interpret "and licensed under part 25 of title 47 of the Code of Federal Regulations" (Sec. 335[b][5][A][ii]) as modifying "a Ku-band fixed service satellite system" and not applying at all to "any distributor who controls a minimum number of channels." There can be no other interpretation because the lone DBS service which falls under this definition conducts business as a program distributor and is not itself a licensee. Furthermore, interpreting the definition in any other manner would wreak havoc on the other services which utilize the Ku-Band transponders of the Part 25 licensee, but are not DBS distributors, not to mention the licensee itself. Therefore the public service obligation falls on the distributor and not the Part 25 satellite licensee (but neither, as we stated earlier, has the Commission been granted authority to license distributors under Part 25).

In view of the mandated requirement of the Act for the FCC to set a specific number of channels for non-commercial use for both Part 25 and Part 100 DBS providers, we

-- The Public Service channel designation would not be triggered until there is a minimum "base" of 20-25 compressed channels from which to draw on. This would represent a minimum of one channel at 4%.

-- As the compressed "channel base" increases, one non-commercial channel may be added to the set-aside for each 25-channel augmentation in the "base" for a total of 4 channels for a 100-channel "base."

-- As we discuss below, we propose to allow for flexibility in the allocation of the political broadcast channel space. DBS providers could either choose to dedicate a single channel for political use or make space available on several, unspecified channels on their systems. The truly non-commercial, public and educational broadcasters would benefit from the increased channel availability as the "channel base" of a provider becomes larger through the use of signal compression.

The Commission must recognize that the demand for time on DBS by public and non-commercial broadcasters is unknown at this time. Thus DBS providers run the risk of facing a potential demand for channel access time which in the initial stages of start-up they may not be able to fulfill. For example, while there is a national Public Broadcast Service network, states and other local entities also produce what may be considered public interest programming. It would be difficult, at best, to accommodate the broadcast demands of such a great disparity of groups. The Public Broadcast Service,

as we know it, broadcasts a full television program day. Barring the availability of other channels, a DBS provider may be hard pressed to find room for other, similar services desiring to air programming under the Rules.

IV. POLITICAL BROADCAST RULES

The Commission is directed by Section 25 of the Act to impose its existing rules implementing Sections 312(a)(7) and 315 to DBS providers. The Commission has also asked in this proceeding how these rules can be tailored to accommodate the differences between DBS and local television broadcasters. While we support the policy inherent in the political broadcast rules, the unique characteristics of DBS require a more careful analysis of the ramifications of the rules on a national service provider.

A principal issue which the Commission has identified revolves around the control of multiple channels by a DBS provider. We would strongly disagree with an approach which made all video channels available to federal candidates. Local broadcast licensees have sufficient control over the formulation of their daily programming schedules so as to be able to make accommodations within the day-parts for political broadcast time. No such luxury may be available to DBS providers because, for the most part, they will carry subscription or premium services where construction of the respective program day will be under the control of the program supplier and not the DBS provider. Consequently, we would not recommend including "advertisement-free" channels in the

political broadcast framework.

By the same token, the Commission has alluded to the rules as they apply to cable systems which, too, control multiple video channels as do DBS service providers. The Commission has hinted that DBS, like cable, may be in a position to "air opposing political advertisements on channels with 'comparable' audience size." But it is important to note that while cable and DBS indeed operate multiple channel systems, the similarity stops there. The FCC's "informal advisory" to cable (referred to above) may work for DBS in certain situations and may not in others.

Both cable and commercial broadcasters have in common what DBS does not -- namely, local broadcast areas. The demands for political advertising on local video providers can be significantly different from a national service like DBS. The latter is tailored for the audience served by the local providers who also have greater control over program day parts. Furthermore, the standard of "comparable audience size," while inherently attractive on a local basis, may or may not be useful because of the national "footprint" of a direct-to-the-home satellite service.

The matter of demographics is important in the political context because a candidate, when either advertising or replying to a political advertisement, seeks to convey his or her message to a similar number of prospective voters within a specified political or geographic area. The singular local reach of a cable operator lends itself better to a

"comparable audience size" principle, but not necessarily to a DBS service provider. So the commonality of cable and DBS of multiple channel control may only be a slender thread as it relates to the targeting of specific and localized viewing audiences.

We agree with the Commission's suggestion that a single, dedicated channel for political advertising could accomplish a political broadcast policy for some DBS providers. But other DBS providers might consider a channel reserved solely for political advertising to be a drain on scarce transponder resources because it would have to be available to all qualified federal candidates (as defined in the FCC Rules) on a 24-hour basis. These providers may desire to satisfy the political broadcast requirement on multiple channels already in use, to be selected as the situation arises. Flexibility is again the key to successful implementation of this important requirement, and we would recommend to the Commission that either channel format should be acceptable. In other words, DBS providers should be able to select either a dedicated channel for political broadcasting if it fits their programming format or the use of space on other program channels provided that the provisions of Sections 312(a)(7) and 315 are observed.

The broader question is also raised, however, as to the desirability of using any channel with a national "footprint" by other than candidates for President or Vice President. Inherent to this discussion is the ability of a DBS provider to offer local or regional broadcast service. We do not believe it would be feasible for the Ku-Band providers, whom we envision as the pioneers in the DBS field, to be able to provide local service

within the framework and requirements for political broadcasting.[1]

While all federally qualified candidates are eligible for access for political advertising, again cable operators and broadcasters offer limited, local advertising exposure presumably to voters in a federal candidate's home district which is served by those video providers. It is difficult to believe that candidates for the U.S. Senate or House of Representatives will find any value in spending campaign advertising funds for any national broadcast time where the principal viewing audience is not constituent based. Political advertising for individual congressional elections is targeted to specific audiences and on specific issues unique to that state or congressional district. DBS hardly lends itself to local campaigning, and its utilization in such a context we would deem to be a waste of campaign resources. Be that as it may, complying with the FCC's rules entails giving access to any qualified federal candidate, and the DBS community is prepared to do so.

Barring the ability of a DBS provider to offer localized distribution, channel space for political broadcasting might only be used in Presidential election years when the candidates seek total national exposure. We would urge that in such instances the DBS provider, again, have the discretion to determine the channel usage format as long as

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[1]The opportunity for a measure of localism in the DBS field may be available some day through satellites, some of which are on the drawing board, which utilize "spot beams" for broadcast coverage in a specific geographic area. These operators will have to determine whether the economics of the local or regional services they will market can support the cost of operating a satellite for limited audiences.

the public service obligation required is being fulfilled on the system.

The Commission is also proposing to apply the Lowest Unit Charge rate for political advertising time on DBS systems. While such unit charges may be measurable for time offered by commercial broadcasters, it may not be for a DBS provider. A broadcaster will typically already have a rate card prepared for the sale of advertising time on the station. It constitutes the bread and butter of station receipts which is the primary source of income to which the LUC can be pegged. By the same token, advertising

limited circumstances. Thus lacking any real history regarding advertising rates in this area, we find difficulty in arriving at an appropriate formula for determining LUC's in a DBS model. The Commission may want to revisit this matter at a later time when DBS rate structures are more firm and can offer empirical evidence from which to gauge an appropriate LUC.

V. CARRIAGE OBLIGATIONS FOR NONCOMMERCIAL, EDUCATIONAL AND INFORMATIONAL PROGRAMMING

Quantification of Number of Channels Required

Earlier in this proceeding, the Commission suggested that channels for the purpose of defining the "base" of a DBS system should be "an explicit number of 24-MHz-wide channels for Part 100 licensees. . .and/or some multiple of 30-36 MHz used for video programming by Part 25 DBS providers." We have already proposed what we believe is an equitable channel structure which defines the necessary "channel base" which would trigger the public service obligations, and a means for determining how channels should be allocated for this purpose on a "staged" basis.

Now the Commission is asking whether the "channel base" should be the actual number of channels licensed, or rather the number of channels available to the consumer. Our proposal opts for the latter because it will be a more meaningful reflection of a stabilized median of channels in a compressed environment. We do not recommend

utilizing a bandwidth criterion for channel measurement, simply a total number of compressed channels against which the set-aside can be formulated. The SBCA proposal for a flat 4% rate levied against an initial 20-25 channel "base," as well as against incremental increases in 25 channel blocks, will serve to maintain a reasonable public service set-aside fully in keeping with the intent of the statute.

Responsibility For Programming

The Commission, in this proceeding, has limited its query regarding editorial control to noncommercial programming and specifically for political broadcasting under Section 315(a). SBCA heartily agrees that a DBS provider should have no liability for harm or FCC violations which may occur through programming over which the provider has no control. In this instance, "control" is the operative context and has other ramifications which go beyond merely the liability under Section 315(a).

It is projected that DBS providers will carry several types of programming where the issue of "control" plays a significant role with regard to the content of the programming being carried. It is clear that because S.12 mandates the carriage of both noncommercial as well as political broadcasting, the DBS operator has virtually no editorial rights, and in fact under Section 315(a) may not censor material of a political candidate. We believe it is equitable and appropriate to apply that same principle to the carriage of all noncommercial programming which would be entitled to utilize the set-asides as prescribed by the public service obligations of the Act. The very fact that

carriage of such programming - irrespective of the service which produces or shows it - is required by Section 25 puts the matter outside the discretion of the DBS provider. The Commission should exempt the provider from any liability for editorial control over any programming carried on the reserved channels.

The subject of editorial control also raises a broader issue of the liability of a DBS provider for other programming carried on its system. The unique characteristic of DBS (and its C-Band brethren) is the national "footprint" it encompasses. It is thus subject to the myriad of state and county laws embodying responsibility for editorial control and the liability inherent in the broadcast of certain programming which may be considered objectionable within each jurisdiction. A DBS operator cannot reasonably be required to track the laws of each jurisdiction covered by the satellite's "footprint."

In order to protect itself from random legal challenges over editorial control, satellite operators frequently reserve the right contractually with program services utilizing transponders to suspend or terminate programming if, in the satellite operator's judgement, the programming is deemed obscene. Suspending program broadcasting of a particular service is a subjective decision on the part of the satellite operator who may be caught in legal tensions beyond his control. On the one side are the local jurisdictions covered by the "footprint" whose laws and statutes against obscenity may be violated by the content of the programming broadcast by the satellite operator's transponder(s). On the other side are program services, over whose program content

the operator has no control, which have leased (or purchased) transponders and whose first amendment rights may be violated by the subjective decision making of the satellite operator.

We raise this issue simply to illustrate the complexities surrounding the liabilities involved in satellite broadcasting and to point to areas of the law which are not clear from the perspective of a satellite operator. But in any event, SBCA agrees emphatically with the Commission's conclusion that DBS operators should not be liable for any political or noncommercial program not under its control, whether or not it is subject to Section 315(a), so long as it is carried on public service set-aside channels.

Definition of National Educational Programming Supplier

While the utility of a national broadcast facility such as DBS may only be appealing to certain types of noncommercial services, a DBS provider may run a real risk that a plethora of services will want to take advantage of national exposure at the favorable rates mandated by the Act. In that case, it is important that the DBS service be allowed flexibility in the selection of services which desire to utilize the set-aside.

DBS providers want to take advantage of the diversity of noncommercial programming which is being made available. A DBS provider, as the marketer of video services to a large body of consumers nationally, will want to offer viewers programming which to

some extent differentiates it from other multichannel video competitors. Thus foreign programming, not-for-profit programming such as C-Span, Mind Extension University, and SCOLA, as well as other unique, noncommercial services all become potential candidates for carriage on the set-aside.

The choice of these program services must be left to the discretion of the DBS provider in order to meet consumer needs while at the same time fulfilling the public service obligations of Section 25. The provider must also have the ability to prioritize the selection of services in those instances where demand for use of the set-aside outstrips channel capacity.

The commencement of multiple channel DBS service marks the first time that coverage will become available to noncommercial broadcasters on a national scale, from a single source. But because DBS is truly an "emerging technology," providers will need flexibility in fulfilling their public service obligations so as to avoid costly and needless disputes over use of the set-aside. SBCA urges the Commission to affirm the rights of DBS providers in selecting public service programmers.

The multiplicity of services which could qualify under the definition of "National Educational Programming Supplier" may be substantial. A few such as the Public Broadcasting Service and C-Span have already established themselves as truly national services and may express a legitimate desire for carriage on a DBS system. However

the increased use of satellite for off-site education and the creation of regional educational networks through consortia or other cooperative arrangements offer a new vista for the utilization of DBS for a large number of consumers. While utilizing the criteria of the Instructional Television Fixed Service, as the Commission suggests, may have some validity in at least qualifying a service for carriage eligibility, DBS providers will still be faced with a greater demand for channel use simply because of the national exposure that DBS offers. This fortifies the need for providers to able to exercise their judgement as to who utilizes the set-aside, when, and in what priority. It will also afford DBS television viewers an outlet to express to providers their preferred public service programming.

Rates

Constructing and launching a satellite, designing appropriate consumer reception equipment, establishing a DBS authorization center, and setting up and financing a retail distribution and marketing organization, makes a DBS venture a very, very expensive proposition. The magnitude of these costs make it even more important that the Commission agree as to what constitutes true "direct costs" in a DBS system for the purpose of determining appropriate rates for noncommercial users. Obviously, consumer subscription fees for commercial services must not only generate sufficient

which noncommercial service rates will be measured should incorporate at a minimum the major elements which have made the satellite and the distribution of satellite service possible in the first place.

The Commission would be remiss if it did not take into account the real costs of putting the satellite into service and keeping it there. Therefore we agree that the construction and maintenance of the satellite, the uplinking and associated service delivery costs, consumer authorization facilities, and other direct costs such as tracking, personnel and insurance are all valid elements within the direct cost base. While Section 25 excludes "marketing costs," we believe that certain costs associated with distribution attributable to noncommercial services whether individually or in a "program package" should be allowable, as they are not marketing costs in the sense of promotion of the DBS service as an entity.

SBCA believes that, in view of the fledgling nature of DBS ventures coupled with the extraordinarily high start-up costs of such ventures, that any rate which is less than 50% of direct costs would be unreasonable. Frankly, the setting of 50% as the appropriate outer range is both puzzling and seemingly arbitrary. Notwithstanding the large capital costs entailed in originating a DBS venture, approximately 4 to 7 percent of channel capacity is mandated to be offered at a rate which possibly may never meet a provider's real cost in making the service available under the terms of Section 25. We do not question the value or the desirability of carrying public service programming

on DBS systems under any circumstances. But it is ironic that on one hand the Congress intended for DBS systems to serve as a new technological competitor to cable while on the other it requires a fixed amount of channel capacity to be offered at less than a real-cost rate of return.

The criterion concerning the nonprofit character of the programmer and any Federal funds used to support the programming is nebulous at best. While it may contain allusions to the eleemosynary nature of certain public service program services, it does not comport with the market place reality and exigencies of the utilization of scarce transponder resources. In any event, while government subsidy may serve to affirm the public service orientation of a particular noncommercial program service, that determination should have little, if any, bearing on the rates offered for use of the public service set-aside.

There are also other forms of rate agreements between providers and noncommercial programmers which the Commission should take into consideration. For example, DBS providers will offer programming to subscribers in a variety of "packages" which will also include the marketing and promotion of such "packages" at the retail level by DBS dealers and representatives. A public service programmer may determine that participation in such a "package" with its attendant benefits of being offered together with other commercial services has an intrinsic market value which goes beyond the framework of the public service obligation itself. In the cable and broadcast worlds, it